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Recommended Citation

Carrie A. Dannenfelser, *Burch v. State: Maintaining the Jury's Traditional Role as the Voice of the Community in Capital Punishment Cases*, 60 Md. L. Rev. 417 (2001)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol60/iss2/7>

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BURCH v. STATE: MAINTAINING THE JURY'S TRADITIONAL ROLE AS THE VOICE OF THE COMMUNITY IN CAPITAL PUNISHMENT CASES

In *Burch v. State*,¹ the Court of Appeals of Maryland considered whether a trial judge had authority under Maryland Rule 4-345(b)² to reconsider a jury-determined sentence of death.³ In reaching its decision, the court explored the United States Supreme Court's discussions of death penalty legislation, as well as Maryland's own capital punishment legislative history,⁴ and concluded that because the trial judge had no discretion to alter the jury-determined sentence of death at the time of the verdict, he could not subsequently reconsider the sentence and reduce it to life imprisonment.⁵ In rejecting the defendant's request for reconsideration of his death sentence, the court properly recognized both the jury's role as the voice of the community and the need for increased reliability in capital case sentencing decisions.

I. THE CASE

On March 22, 1996, a jury in the Circuit Court for Prince George's County convicted Heath William Burch of the premeditated first-degree murders of Robert and Cleo Davis.⁶ The jury also found Burch guilty of three counts of felony murder, based on the underlying felonies of burglary, robbery, and robbery with a deadly weapon.⁷

1. 358 Md. 278, 747 A.2d 1209 (2000).

2. Md. R. 4-345(b). The Rule states:

The court has revisory power and control over a sentence upon a motion filed within 90 days after its imposition (1) in the District Court, if an appeal has not been perfected, and (2) in a circuit court, whether or not an appeal has been filed. Thereafter, the court has revisory power and control over the sentence in case of fraud, mistake, or irregularity, or as provided in section (d) of this Rule.

Id.

3. *Burch*, 358 Md. at 280, 747 A.2d at 1210.

4. *Id.* at 281-92, 747 A.2d at 1211-16.

5. *Id.* at 294-96, 747 A.2d at 1217-18.

6. *See id.* at 280, 747 A.2d at 1210; *Burch v. State*, 346 Md. 253, 259, 696 A.2d 443, 446, *cert. denied*, 522 U.S. 1001 (1997). The earlier Court of Appeals decision described in greater detail the facts and circumstances of the case and the aggravating factors that led the jury to a sentence of death. The jury found that Burch had broken into the home of Robert and Cleo Davis with the intention of stealing property to sell for cocaine. *Burch*, 346 Md. at 259, 696 A.2d at 446. Mr. and Mrs. Davis awoke to the sound of Burch entering the house, and when they confronted him, he violently and fatally attacked them and proceeded to steal guns, money, and Mr. Davis's truck. *Id.*

7. *Burch*, 346 Md. at 259, 696 A.2d at 446.

The jury sentenced Burch to death, and the trial judge imposed two death sentences, one for each victim.⁸

Pursuant to the mandatory procedure in death penalty cases, the case proceeded directly to the Court of Appeals.⁹ Burch also filed a motion in circuit court for reconsideration of his death sentence pursuant to Maryland Rule 4-345(b),¹⁰ and asked the trial court to hold the motion *sub curia* until the parties requested a hearing.¹¹

The Court of Appeals affirmed the two guilty verdicts and one of the death sentences, but vacated the second death sentence.¹² The United States Supreme Court denied Burch's petition for certiorari,¹³ and the trial court denied all attempts at post-conviction relief.¹⁴ Finally, the Court of Appeals denied his application for leave of appeal.¹⁵

Both parties then requested that the trial court hold a hearing on Burch's motion for reconsideration of sentence.¹⁶ On January 28, 1999, the circuit court heard the motion, and the trial judge ruled that he lacked the authority to reconsider a jury-determined sentence of death and thus denied Burch's motion.¹⁷

8. *Id.* The jury and court acted in accordance with the death penalty law of Maryland. The law requires the jury (or the judge, if the defendant waives a jury trial) first to determine whether the defendant "is guilty of murder in the first degree or murder in the second degree." MD. ANN. CODE art. 27, § 412(a) (1996). The law then requires a separate sentencing hearing to be held in order to determine the punishment. *Id.* § 413(a). If the jury (or judge) determines that a sentence of death is the appropriate punishment, "then the court shall impose a sentence of death." *Id.* § 413(k).

9. See MD. ANN. CODE art. 27, § 414(a).

10. MD. R. 4-345(b); see *supra* note 2 (setting forth the language of the Rule that allows for sentence reconsideration).

11. *Burch*, 358 Md. at 280-81, 747 A.2d at 1210.

12. *Burch*, 346 Md. at 299, 696 A.2d at 466. The Court of Appeals held that both sentences of death were unimpeachable, but because only one death sentence can be carried out, the court vacated one of the sentences in favor of life imprisonment and left the other sentence undisturbed. *Id.* at 291-92, 696 A.2d at 462-63. The court reasoned that this remedy would effectuate the intent and determination of the jury. *Id.* at 292, 696 A.2d at 463. Because the jury had sentenced Burch to die for both murders, the court stated that vacating one sentence over the other made no difference. *Id.* The court affirmed the sentence imposed for the murder of Mr. Davis and remanded the sentence for the murder of Mrs. Davis for entry of a sentence of life imprisonment. *Id.*

13. *Burch v. Maryland*, 522 U.S. 1001 (1997).

14. *Burch*, 358 Md. at 281, 747 A.2d at 1210.

15. *Id.*

16. *Id.*, 747 A.2d at 1211.

17. *Id.* Judge Platt, the same judge that had presided over Burch's original trial, held that Maryland Rule 4-345 did not apply to jury-determined sentences of death. *Id.* Also, because the trial judge must impose the death penalty when a jury determines a sentence of death, the circuit court did not have the authority to reconsider the sentence. *Id.*

The Court of Appeals granted certiorari to consider “whether the trial judge properly concluded that he had no authority under Maryland Rule 4-345(b) to modify a jury-determined sentence of death.”¹⁸

II. LEGAL BACKGROUND

In *Burch v. State*, the Court of Appeals outlined the recent history of the United States Supreme Court’s death penalty decisions.¹⁹ Examination of this history demonstrates that the Supreme Court scrutinized death penalty statutes during two periods—between 1972 and 1976, and after 1976. In 1972, in *Furman v. Georgia*,²⁰ the Supreme Court for the first time reversed death sentences on constitutional grounds.²¹ The Court spoke again on the constitutionality of death penalty statutes in five cases that were all decided on July 2, 1976, and provided a constitutional framework for death penalty statutes within which the states had some discretion.²² In addition to the Court of Appeals’s review of this history, an examination of the traditional role of the jury in capital punishment cases yields another basis for the *Burch* decision.²³

18. *Id.* at 280, 747 A.2d at 1210.

19. *Id.* at 286-89, 747 A.2d at 1213-15.

20. 408 U.S. 238 (1972).

21. *See id.* at 256-57 (Douglas, J., concurring) (“Thus, these discretionary [death penalty] statutes are unconstitutional in their operation.”); *id.* at 305 (Brennan, J., concurring) (“The punishment of death is therefore ‘cruel and unusual,’ and the States may no longer inflict it as a punishment for crimes.”); *id.* at 310 (Stewart, J., concurring) (“I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”); *id.* at 314 (White, J., concurring) (“In my judgment what was done in these cases violated the Eighth Amendment.”); *id.* at 360 (Marshall, J., concurring) (“[E]ven if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.”).

22. *See Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (“For the reasons expressed in this opinion, we hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution.”); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (“Because [Texas’s capital sentencing] system serves to assure that sentences of death will not be ‘wantonly’ or ‘freakishly’ imposed, it does not violate the Constitution.” (quoting *Furman*, 408 U.S. at 310 (Stewart, J., concurring))); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (“Accordingly, we find that the death sentence imposed upon the petitioner under Louisiana’s mandatory death sentence statute violates the Eighth and Fourteenth Amendments and must be set aside.”); *Proffitt v. Florida*, 428 U.S. 242, 259 (1976) (“Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster.”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“For the reasons stated, we conclude that the death sentences imposed upon the petitioners under North Carolina’s mandatory death sentence statute violated the Eighth and Fourteenth Amendments and therefore must be set aside.”); *see also infra* Part II.B (describing these five cases and the results of each opinion).

23. *See Burch*, 358 Md. at 290, 747 A.2d at 1215-16 (noting that Florida’s capital sentencing procedure, in which juries render “advisory” sentences, “departs from the traditional

A. *Furman v. Georgia: The Death Penalty in Violation of the Eighth and Fourteenth Amendments*

In *Furman*, a majority of the Supreme Court reversed death penalty sentences on constitutional grounds, holding that the death sentences constituted cruel and unusual punishments and thus violated the Eighth²⁴ and Fourteenth²⁵ Amendments to the United States Constitution.²⁶ In response to *Furman*, many states rushed to conform their existing death penalty statutes to what they understood were the newly enunciated constitutional requirements.²⁷ Maryland reacted by invalidating its former discretionary death penalty statute²⁸ and by establishing a mandatory death penalty regime.²⁹

In *Furman*, the United States Supreme Court granted certiorari to consider whether "the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in viola-

role of the jury in Maryland in capital cases" (quoting Memorandum from Thomas J. Peddicord, Jr., Chief Legislative Officer, to the Maryland General Assembly 19 (Dec. 14, 1977) (available at the Maryland Department of Legislative Reference Library, Bill File for S.B. 374 (1978))); see also *infra* Part II.E (explaining the role of the jury in capital punishment cases).

24. The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

25. The Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

26. See *supra* note 21 (citing the decisions of Justices Douglas, Brennan, Stewart, White, and Marshall).

27. See Roxane J. Perruso, *And Then There Were Three: Colorado's New Death Penalty Sentencing Statute*, 68 U. COLO. L. REV. 189, 190 (1997) (explaining that within two years, twenty-nine states had enacted new death penalty statutes in response to *Furman*).

28. See *Bartholomey v. State*, 267 Md. 175, 184, 297 A.2d 696, 701 (1972) (finding that a death penalty statute is unconstitutional if its imposition is not mandatory). The former Maryland statute stated: "Every person convicted of murder in the first degree . . . shall suffer death, or undergo a confinement in the penitentiary of the State for the period of their natural life, in the discretion of the court before whom such person may be tried . . ." MD. ANN. CODE art. 27, § 413 (1957) (emphasis added).

29. *Burch*, 358 Md. at 287, 747 A.2d at 1214 (explaining that after the Court of Appeals declared Maryland's death penalty statute unconstitutional in *Bartholomey*, the Maryland legislature reacted by passing a mandatory death penalty regime, codified at MD. ANN. CODE art. 27, § 413 (1976)). A mandatory death penalty statute is one that entirely eliminates a sentencer's discretion. Scott E. Erlich, Comment, *The Jury Override: A Blend of Politics and Death*, 45 AM. U. L. REV. 1403, 1413 (1996). A mandatory statute automatically requires death sentences "for certain specified forms of murder." *Id.*

tion of the Eighth and Fourteenth Amendments.”³⁰ A sharply divided Court produced nine separate opinions and voted 5-4 that the imposition of the death penalty in these cases was unconstitutional.³¹

Prior to the *Furman* decision, Georgia’s and Florida’s death penalty statutes gave juries or judges uncontrolled discretion to impose sentences of death.³² As Justice Douglas explained, however, the Eighth Amendment demands that legislatures write laws that are “evenhanded, nonselective, and nonarbitrary,” and it requires that “judges . . . see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.”³³ He reasoned that the Cruel and Unusual Punishments Clause of the Eighth Amendment includes the theme of equal protection,³⁴ and that a punishment

30. *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (alteration in original) (quoting *Furman v. Georgia*, 403 U.S. 952, 952 (1971)). The Court granted certiorari to review the decision of the Supreme Court of Georgia to impose the death penalty on defendants convicted of murder and rape. *Id.* The Court also reviewed the judgment of the Court of Criminal Appeals of Texas to impose the death penalty on a defendant convicted of rape. *Id.* The statutes of each state left to the discretion of the judge or the jury the determination of whether the death penalty should be imposed. *Id.* at 240 (Douglas, J., concurring).

31. See *Furman*, 408 U.S. at 240. Justices Douglas, Brennan, Stewart, White, and Marshall filed separate opinions in support of the judgment, while Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist filed separate dissenting opinions. *Id.* Justices Brennan and Marshall found that a state’s imposition of the death penalty constitutes a cruel and unusual punishment in all cases and in all circumstances. *Id.* at 305 (Brennan, J., concurring); *id.* at 358-59 (Marshall, J., concurring). Justice Douglas concluded that the sentencing discretion allowed in the statutes violated the principle of equal protection implicit in the Eighth Amendment because such statutes had been infrequently and arbitrarily applied to unpopular groups. *Id.* at 255-57 (Douglas, J., concurring). Justice Stewart decided that discretionary statutes had been arbitrarily applied in “wanton,” “freakish” manners and thus violated the Eighth and Fourteenth Amendments. *Id.* at 310 (Stewart, J., concurring). Justice White believed that the infrequent imposition of the statutes suggested that the death penalty no longer furthered any social or public purpose, making the death penalty cruel and unusual punishment. *Id.* at 312-14 (White, J., concurring).

Chief Justice Burger stated that Justices White and Stewart “fundamentally misconceive[d] the nature of the Eighth Amendment” and made decisions contrary to controlling authority. *Id.* at 375 (Burger, C.J., dissenting). Justice Blackmun concluded that the issue was one for the legislative branch, not for the judiciary. *Id.* at 410-11 (Blackmun, J., dissenting). Justice Powell held that none of the five Justices provided a constitutionally adequate basis for his decision. *Id.* at 414 (Powell, J., dissenting). Finally, Justice Rehnquist raised concerns about the proper role of the Court and stated that the five Justices in the plurality overstepped the boundary of judicial review. *Id.* at 470 (Rehnquist, J., dissenting).

32. See Michael Mello & Ruthann Robson, *Judge Over Jury: Florida’s Practice of Imposing Death over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 35 (1985); see also *Furman*, 408 U.S. at 253 (Douglas, J., concurring) (finding that the death penalty statutes of these two states “leave to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty.”).

33. *Furman*, 408 U.S. at 256 (Douglas, J., concurring).

34. *Id.* at 249.

should be considered “unusually imposed if it is administered arbitrarily or discriminatorily.”³⁵ Similarly, Justice Marshall expressed concern that the discretionary laws allowed discriminatory sentiments to creep into decisions.³⁶ Consequently, the five Justices supporting the judgment held that unguided, discretionary sentencing authority that resulted in the arbitrary, capricious, and random imposition of the death penalty constituted a cruel and unusual punishment and therefore violated the Eighth and Fourteenth Amendments to the Constitution.³⁷

As a result of its decision in *Furman*, the Supreme Court vacated death sentences that had been imposed in 120 other pending cases and remanded those cases for further proceedings.³⁸ After the state courts heard the remanded cases, many legislatures overhauled their existing death penalty statutes, and within four years, thirty-five states enacted new death penalty laws.³⁹ Because each of the nine Justices had written a different opinion in *Furman*, however, the states had difficulty determining what type of capital punishment statute the Court would find constitutional.⁴⁰ The states merely knew that unlimited discretion was unconstitutional because it permitted sentencers to impose the death sentence arbitrarily.⁴¹ In response to this confusion, the federal government and at least ten states, including Maryland,⁴²

35. *Id.* (quoting Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)).

36. *Id.* at 364 (Marshall, J., concurring). To support his opinion, Justice Marshall provided statistics that showed race and gender discrimination in the application of discretionary sentencing statutes. *See id.* at 264-66. For example, Marshall explained that of the 3859 people executed between 1930 and 1972, 1751 were white and 2066 were African American. *Id.* at 364. Of those executed, only 32 were women. *Id.* at 365; *see also id.* at 249-50 (Douglas, J., concurring) (citing evidence that the death penalty is “disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups”) (quoting THE PRESIDENT’S COMM. ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 143 (1967))).

37. *See id.* at 255-57 (Douglas, J., concurring); *id.* at 291-305 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 312-14 (White, J., concurring); *id.* at 364-71 (Marshall, J., concurring).

38. *Bartholomey v. State*, 267 Md. 175, 183, 297 A.2d 696, 700 (1972).

39. Kathryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 8 (1994).

40. Erlich, *supra* note 29, at 1412-13.

41. *Id.* at 1413.

42. *See, e.g., Bartholomey*, 267 Md. at 184, 297 A.2d at 701. The Court of Appeals held that Maryland’s existing death penalty statute was unconstitutional because it authorized, but did not require, the jury or judge to impose the death penalty. *Id.* The court explained that “the net result of the holding in *Furman* [was] that the death penalty is unconstitutional when its imposition is not mandatory.” *Id.* As a result, Maryland enacted Senate Bill 292 (Chapter 252 of the Laws of Maryland of 1975), which provided for a mandatory death penalty as punishment for convictions of nine types of first-degree murder. Memo-

interpreted the *Furman* decision as requiring laws that provided for mandatory capital punishment in certain circumstances and subsequently passed such laws.⁴³

B. The States' Responses to Furman-Revised Death Penalty Statutes: The 1976 Decisions

The Supreme Court decided five cases on July 2, 1976: *Gregg v. Georgia*,⁴⁴ *Proffitt v. Florida*,⁴⁵ *Jurek v. Texas*,⁴⁶ *Woodson v. North Carolina*,⁴⁷ and *Roberts v. Louisiana*.⁴⁸ For each case, the Court considered whether the imposition of the death sentence under the particular state statute violated the Constitution.⁴⁹ The five decisions helped to clarify many of *Furman*'s ambiguities, but they still did not clearly define the standard for a constitutional death penalty statute.⁵⁰

1. *North Carolina and Louisiana: Mandatory Death Penalty Statutes in Response to Furman.*—North Carolina and Louisiana both enacted mandatory death penalty laws in response to the *Furman* decision.⁵¹ The Supreme Court ultimately concluded that although the mandatory schemes prevented the unbridled discretion of a jury or

random from Thomas J. Peddicord, Jr., *supra* note 23, at 3; see also *Blackwell v. State*, 278 Md. 466, 468-69, 365 A.2d 545, 547 (1976) (providing the text of Chapter 252 of the Laws of Maryland of 1975 and describing the types of murder for which the death penalty is the mandated punishment).

43. See Memorandum from Thomas J. Peddicord, Jr., *supra* note 23, at 3.

44. 428 U.S. 153, 207 (1976) ("For the reasons expressed in this opinion, we hold that the statutory system under which Gregg was sentenced does not violate the Constitution. Accordingly, the judgment of the Georgia Supreme Court is affirmed.").

45. 428 U.S. 242, 259 (1976) ("Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster.").

46. 428 U.S. 262, 276 (1976) ("Because [Texas's capital sentencing] system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution.").

47. 428 U.S. 280, 305 (1976) ("For the reasons stated, we conclude that the death sentences upon the petitioners under North Carolina's mandatory death sentence statute violated the Eighth and Fourteenth Amendments and therefore must be set aside.").

48. 428 U.S. 325, 336 (1976) ("Accordingly, we find that the death sentence imposed upon the petitioner under Louisiana's mandatory death sentence statute violates the Eighth and Fourteenth Amendments and must be set aside.").

49. See Memorandum from Thomas J. Peddicord, Jr., *supra* note 23, at 4 (summarizing the five cases).

50. *Id.* at 5. The Supreme Court's decisions were not definitive because they did not point to one standard for all states to implement or follow. *Id.* The Court's opinions provided a constitutional framework for death penalty statutes within which the states had some discretion. See *id.*

51. See *Woodson*, 428 U.S. at 286-87 (explaining that North Carolina responded to the *Furman* decision by making the death penalty the mandatory punishment for all people convicted of first-degree murder); *Roberts*, 428 U.S. at 331 (explaining that Louisiana also replaced its discretionary jury sentencing in capital cases with mandatory death sentences).

judge, the states' new death penalty laws violated the Eighth and Fourteenth Amendments to the Constitution.⁵² The Court explained that the Eighth Amendment takes much of its meaning from "the evolving standards of decency that mark the progress of a maturing society."⁵³ The Court examined the history of mandatory death penalty laws and found that juries and legislatures had rejected such laws as harsh and "unworkably rigid."⁵⁴ The Court reasoned that because the Eighth Amendment draws much of its meaning from present standards of decency, and society as a whole has moved away from mandatory death penalty sentencing, such mandatory statutes violated the Eighth Amendment in part because they follow a practice that society has rejected.⁵⁵

The Court also concluded that mandatory death penalty statutes fell short of constitutional requirements because they did not allow particularized consideration of the character and record of each convicted defendant.⁵⁶ According to the Court, a mandatory death sentence treats all persons convicted of a specific offense "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."⁵⁷ This type of disregard for humanity conflicted with the requirement that, because the death penalty is qualitatively different from all other sentences, courts must ensure reliability in the determination that death is an appropriate sanction.⁵⁸ The Court explained that mandatory death penalty statutes offer no reliability because they do not require consideration of the individual or the circumstances surrounding the case.⁵⁹ As a result, the Court held that the mandatory death sentences did not respond to the requirement of *Furman*.⁶⁰ "replacing arbitrary and wanton jury discretion with objec-

52. *Roberts*, 428 U.S. at 336; *Woodson*, 428 U.S. at 305.

53. *Woodson*, 428 U.S. at 301 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

54. *Id.* at 293. The Court further explained that "[a]t least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict." *Id.* This resulted in legislative bodies enacting discretionary jury sentencing. *Id.*

55. *Id.* at 301. *But see* *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976) ("[T]he Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. . . . [T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").

56. *Woodson*, 428 U.S. at 304.

57. *Id.* The Court stated that the Eighth Amendment requires consideration of both the character and record of the defendant and of the particular circumstances of the offense in the process of imposing the death penalty. *Id.*

58. *Id.* at 305.

59. *Id.*

60. *Id.* at 302; *Roberts v. Louisiana*, 428 U.S. 325, 334 (1976).

tive standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.”⁶¹

2. *Georgia, Florida, and Texas: Limited and Guided Sentencing Discretion in Response to Furman.*—In contrast to North Carolina’s and Louisiana’s death penalty schemes, the Court found Georgia’s, Florida’s, and Texas’s revised statutes not unconstitutional.⁶² Although the statutes of the three states varied in some respects, all of the statutes gave the jury or judge some discretion when deciding whether to impose the death penalty.⁶³ The jury’s or judge’s allotted discretion came into play in the sentencing phase of the trial.⁶⁴ Both Florida and Georgia required the sentencing body to consider and weigh aggravating and mitigating circumstances present in the particular case before deciding on the punishment.⁶⁵ In Texas, the death penalty law narrowed the categories of crimes for which the death penalty could be imposed.⁶⁶ In the sentencing phase, a Texas jury was presented with three specific questions about the defendant’s conduct and the likelihood that the defendant posed a continuing threat to society.⁶⁷ If the jury unanimously answered in the affirmative to all three questions, the court was obligated to sentence the defendant to death.⁶⁸ If there was a negative answer to any question with at least ten people in agreement, the sentence had to be life imprisonment.⁶⁹ The Court held that the sentencing discretion found in the three statutes was not the same type of discretion that had been held unconstitutional in

61. *Woodson*, 428 U.S. at 303.

62. See *supra* notes 44-46 (stating the holdings of *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976)); see also *infra* notes 141-149 and accompanying text (describing current Fifth Amendment concerns with Florida’s death penalty sentencing scheme).

63. See *Gregg*, 428 U.S. at 162-68 (describing Georgia’s statutory scheme for the imposition of the death penalty, which established a bifurcated trial process whereby the jury or judge first determines guilt and then determines the punishment at a sentencing hearing); *Proffitt*, 428 U.S. at 247-52 (describing the Florida death penalty scheme, which is a trifurcated trial process in which the jury or judge first determines guilt, the jury then renders an advisory sentence as to punishment, and the judge decides on the ultimate punishment); *Jurek*, 428 U.S. at 268-71 (describing Texas’s death penalty legislation which, like Georgia’s, provides for a bifurcated trial process).

64. See *Gregg*, 428 U.S. at 163-66; *Proffitt*, 428 U.S. at 248-51; *Jurek*, 428 U.S. at 270-71.

65. See *Gregg*, 428 U.S. at 163-64 (describing Georgia’s statutory sentencing scheme); *Proffitt*, 428 U.S. at 248-51 (listing and describing the aggravating and mitigating circumstances considered during the capital sentencing procedure).

66. See *Jurek*, 428 U.S. at 268.

67. *Id.* at 269.

68. *Id.*

69. *Id.*

Furman,⁷⁰ rather, "'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.'" ⁷¹ All three states also required prompt appellate review,⁷² which the Court viewed "[a]s an important additional safeguard against arbitrariness and caprice."⁷³

C. *The States' Responses to the July 2, 1976 Decisions*

The Court's affirmations of Georgia's, Florida's, and Texas's statutes provided states with different models of constitutional death penalty legislation. One of the differences among these statutes was the respective role of the jury and judge in sentencing.⁷⁴ In Georgia, if the jury acted as the sentencing body, the trial judge was bound by the jury's recommended sentence.⁷⁵ The federal government and two-thirds of the states with capital punishment statutes followed Georgia's scheme and placed final sentencing power with the jury.⁷⁶ In five

70. See *Gregg*, 428 U.S. at 197-98 (holding that although the Georgia scheme still allows some jury discretion, the statute controls the jury discretion by clear and objective standards); *Proffitt*, 428 U.S. at 251-52 (stating that Florida's scheme of weighing eight aggravating factors against seven mitigating factors requires the trial judge to focus on the circumstances of the crime and the character of the defendant); *Jurek*, 428 U.S. at 274 (holding that the Texas sentencing procedure effectively guides and focuses the jury through the sentencing process).

71. *Gregg*, 428 U.S. at 198 (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)).

72. See *id.* at 166-68; *Proffitt*, 428 U.S. at 250-51; *Jurek*, 428 U.S. at 269.

73. *Gregg*, 428 U.S. at 198.

74. See *Burch*, 358 Md. at 288-89, 747 A.2d at 1214-15 (explaining the roles of the jury and judge in the Georgia and Florida systems and noting that there were structural differences among the systems of all three states).

75. See *Gregg*, 428 U.S. at 166 (citing GA. CODE ANN. §§ 26-3102, 27-2514 (Supp. 1975)).

76. See Michael Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923, 924 n.2 (1991). States that have vested final sentencing authority in the jury are: Arkansas, ARK. CODE ANN. § 5-4-603 (Michie 1997); California, CAL. PENAL CODE § 190.3 (West 1998); Connecticut, CONN. GEN. STAT. ANN. § 53a-46a (West 1994 & Supp. 2000); Georgia, GA. CODE ANN. §§ 17-10-30 to 17-10-32 (1997); Illinois, 720 ILL. COMP. STAT. ANN. 5/9-1 (West 1993 & Supp. 2000); Kentucky, KY. REV. STAT. ANN. § 532.025 (Banks-Baldwin 1995); Louisiana, LA. CODE CRIM. PROC. ANN. art. 905.8 (West 1991); Maryland, MD. ANN. CODE art. 27, § 413 (1996); New Hampshire, N.H. REV. STAT. ANN. § 630:5 (1996); New Jersey, N.J. STAT. ANN. § 2C:11-3 (West 1995 & Supp. 2000); New Mexico, N.M. STAT. ANN. § 31-20A-3 (Michie 1990); North Carolina, N.C. GEN. STAT. § 15A-2000 (1983); Ohio, OHIO REV. CODE ANN. § 2929.03 (Anderson 1996); Oklahoma, OKLA. STAT. ANN. tit. 21, § 701.11 (West 1983 & Supp. 2000); Pennsylvania, 42 PA. CONS. STAT. ANN. § 9711(f) (1997); South Carolina, S.C. CODE ANN. § 16-3-20 (Law. Co-op. 1985); South Dakota, S.D. CODIFIED LAWS § 23A-27A-3 to 23A-27A-4 (Michie 1998); Tennessee, TENN. CODE ANN. § 39-13-204 (1997); Texas, TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981); Utah, UTAH CODE ANN. § 76-3-207 (1995); Virginia, VA. CODE ANN. § 19.2-264.4 (Michie 2000); Washington, WASH. REV. CODE ANN. § 10.95.030 (West 1988); and Wyoming, WYO. STAT. ANN. § 6-2-102 (Michie 1999). In Nevada, if a jury cannot reach a sentence, a three-judge panel determines the punishment. NEV. REV. STAT. ANN. §§ 175.554, 175.556 (Michie 1997).

states—Arizona, Colorado, Idaho, Montana, and Nebraska—the judge alone became authorized to determine the punishment.⁷⁷ Three states—Alabama, Delaware, and Indiana—followed Florida’s scheme of sentencing,⁷⁸ which considered the jury’s sentencing decision to be an advisory verdict that the judge could either accept or override.⁷⁹

D. Maryland’s Response to the July 2, 1976 Decisions

In Maryland, the Court of Appeals confronted the constitutionality of its capital punishment statutes in *Blackwell v. State*.⁸⁰ At the time, Maryland had a mandatory death penalty scheme in place.⁸¹ After reviewing the statute, the Court of Appeals concluded that the statute did not contain “any clear or precise guidelines enabling the sentencing authority to focus [upon] and consider particularized mitigating factors.”⁸² The court thus held that Maryland’s death penalty statutes were unconstitutional.⁸³

Following *Blackwell*, the legislature once again attempted to draft a death penalty statute, and it looked to Georgia’s, Florida’s, and Texas’s constitutional capital punishment statutes for guidance.⁸⁴ In the 1978 session, legislators introduced Senate Bill 374, which created a bifurcated trial process that separately determined guilt and punish-

77. In Arizona, Idaho, and Montana, the capital punishment statutes allow a single judge to determine the sentence, while in Nebraska and Colorado, the statutes call for sentence determination by a three-judge panel. See Perruso, *supra* note 27, at 216 (citing ARIZ. REV. STAT. ANN. § 13-703(B) (West 2001); COLO. REV. STAT. § 16-11-103(a) (Supp. 2000); IDAHO CODE § 19-2515(c) (Michie Supp. 2000); MONT. CODE ANN. § 46-18-301 (1995); NEB. REV. STAT. § 29-2520 (1995)).

78. Russell, *supra* note 39, at 6 (citing ALA. CODE § 13-A-5-47(e) (1994); DEL. CODE ANN. tit. 11, § 4209(d)(1) (1995); IND. CODE ANN. § 35-30-2-9(e)(2) (Michie 1998)). Ohio and Kentucky also refer to the jury’s verdict of life or death as a recommendation. Perruso, *supra* note 27, at 216 (citing OHIO REV. CODE ANN. § 2929.03(D) (Page 1999); KY. REV. STAT. ANN. § 532.025(1)(b) (Baldwin 1995)). In these states, however, the trial judge may reduce a jury’s recommendation of death, but she cannot increase a jury’s recommendation of life imprisonment to a death sentence. *Id.*

79. See ALA. CODE § 13A-5-47(a) (“After the sentence hearing has been conducted, and after the jury has returned an *advisory verdict* . . .” (emphasis added)); DEL. CODE ANN. tit. 11, § 4209(d)(1) (“A sentence of death shall be imposed, after considering the *recommendation* of the jury . . .” (emphasis added)); IND. CODE ANN. § 35-50-2-9(e)(2) (“The court is not bound by the jury’s *recommendation*.” (emphasis added)); see also Perruso, *supra* note 27, at 215. In the four states, a judge may use jury override to reduce a jury’s advisory sentence of death or to increase an advisory sentence of life. Perruso, *supra* note 27, at 215.

80. 278 Md. 466, 365 A.2d 545 (1976).

81. *Id.* at 472, 365 A.2d at 549.

82. *Id.* at 472-73, 365 A.2d at 549 (alteration in original) (quoting Francis B. Burch, Attorney General of Maryland).

83. *Id.* at 473, 365 A.2d at 549.

84. See Burch, 358 Md. at 288, 747 A.2d at 1214.

ment.⁸⁵ The bill listed nine aggravating factors and eight mitigating factors, and it provided guidelines to the jury to lead them, step-by-step, in their consideration and weighing of the aggravating and mitigating factors.⁸⁶ The bill also mandated automatic and expedited appellate review⁸⁷ and placed sentencing authority with the jury instead of with the trial judge.⁸⁸ As a result of these cautionary measures, the bill passed, and it remains as Maryland's death penalty scheme.⁸⁹

E. The Role of the Jury in Capital Punishment Cases

The jury in criminal cases acts to ensure that the government does not assert unchecked arbitrary power over the criminal process.⁹⁰ The framers of the state and federal governments feared unchecked power, and this fear expressed itself in the insistence "upon community participation in the determination of guilt or innocence" in criminal cases.⁹¹ This recognition of the importance of a jury trial "applies with special force" to the decision that precedes the deprivation of life.⁹²

Historically, legislators placed very few restraints on juries in criminal cases—likely in response to the vision of the jury as a buffer between the government and the accused.⁹³ The authors of state and federal constitutions recognized from history and experience that governments may use illegitimate criminal charges to eliminate enemies.⁹⁴ Indeed, juries act as protection against this potential

85. 62 Md. Op. Att'y Gen. 109, 112 (1977).

86. *Id.* at 112-13. The bill also permitted the sentencing authority to consider any mitigating factor not listed. *Id.*

87. *Id.* at 113.

88. *Id.* at 114.

89. See MD. ANN. CODE art. 27, §§ 412-414 (1996).

90. *Spaziano v. Florida*, 468 U.S. 447, 482 (1984) (Stevens, J., dissenting). Justice Stevens added that "community participation is 'critical to public confidence in the fairness of the criminal justice system.'" *Id.* (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)).

91. *Id.* (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

92. *Id.* at 483; see *id.* at 482-83 ("The same consideration that supports a constitutional entitlement to a trial by a jury rather than a judge at the guilt or innocence stage . . . applies with special force to the determination that must precede a deprivation of life.").

93. See Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1051 (1991) (explaining that in America, juries in criminal cases have been given greater discretion than juries in civil cases because of the idea that criminal law is a "knowable and discoverable fact" and also because of the idea of the jury as a guardian of the accused's rights). Judge Higginbotham also suggests that legislators have placed fewer controls on juries in criminal cases than in civil cases because "moral culpability remains within the domain of everyone's law." *Id.*

94. See *Spaziano*, 468 U.S. at 481 (Stevens, J., dissenting) ("Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive

oppression by representing the voice of the community's values and attitudes.⁹⁵ Juries reflect the reluctance of the framers to entrust to one judge the complete power over the life and liberty of a citizen.⁹⁶ Instead, the framers insisted upon community participation in the decision of guilt or innocence and guaranteed the right to a jury trial in criminal cases.⁹⁷

III. THE COURT'S REASONING

In *Burch v. State*, the Court of Appeals held that the trial judge properly concluded that he possessed no power under Maryland Rule 4-345(b) to modify the defendant's jury-determined death sentence.⁹⁸ In reaching its decision, the court reviewed Maryland's death penalty sentencing scheme, the legislative history of that scheme, the history of death penalty legislation in the United States, and the sentencing procedures of other states.⁹⁹ The court concluded that the legislative history of Maryland's death penalty and the language of the death penalty sentencing scheme mandated that the jury determine the sentence.¹⁰⁰ Therefore, the court reasoned that if the judge may not override the jury's sentence at the time of the verdict, he may not reconsider the sentence at a later time.¹⁰¹

In so holding, the court relied heavily on the statutory language of the death penalty laws set forth in the Maryland Annotated Code (the Code),¹⁰² which provide the correct sentencing procedure to be followed in capital cases.¹⁰³ Under the Code, if the jury finds that

to the voice of higher authority."); see also *infra* Part IV.B.2 (explaining the danger of allowing elected judges to decide the fates of a criminal defendants charged with capital crimes).

95. See Higginbotham, *supra* note 93, at 1052 ("By drawing persons from the populace and vesting them with powers over the liberty of others and maintaining their anonymity, we draw upon the jury's ability to mirror the community's values and attitudes.").

96. *Spaziano*, 468 U.S. at 482 (Stevens, J., dissenting) (quoting *Duncan*, 391 U.S. at 155-56).

97. *Id.* (quoting *Duncan*, 391 U.S. at 155-56).

98. *Id.* at 296, 747 A.2d at 1218.

99. *Id.* at 281-95, 747 A.2d at 1211-18.

100. *Id.* at 291-92, 747 A.2d at 1216.

101. *Id.* at 292, 747 A.2d at 1216.

102. *Id.* at 281-83, 747 A.2d at 1211-12; see also MD. ANN. CODE art. 27, §§ 412-414 (2000) (setting forth the sentencing scheme in Maryland for capital cases). Section 412 of the Code provides the punishment for murder. Art. 27, § 412. Section 413 describes the statutory procedure to be followed if the finder of fact determines that a person is guilty of first-degree murder. *Id.* § 413. Section 414 states the process of review of death sentences. *Id.* § 414.

103. See MD. ANN. CODE art. 27, § 413 (2000) (describing the procedure to be followed if the finder of fact determines that a person is guilty of first-degree murder). Section 413 lists ten aggravating and eight mitigating factors for the finder of fact to consider in deter-

death is the appropriate sentence, then the statute mandates that "the court *shall* impose a sentence of death."¹⁰⁴ The court explained that "shall" usually indicates a mandatory intent unless something in the statute indicates otherwise.¹⁰⁵ Therefore, the court reasoned that, absent the existence of an illegal sentence, the trial judge had no discretion to impose anything other than the jury's verdict.¹⁰⁶

Burch filed a motion for reconsideration of his death sentence under Maryland Rule 4-345(b),¹⁰⁷ which relates to the court's revisory power over a sentence upon motion within ninety days after its imposition.¹⁰⁸ After the trial court found that it lacked the authority to grant his motion, Burch argued to the Court of Appeals that the rule applied to capital cases and asserted that if the legislature had intended to preclude modification of death sentences, then it would have made that intent clear in the language of Rule 4-345.¹⁰⁹

The court rejected Burch's argument based on the legislative scheme of the death penalty statute.¹¹⁰ The Maryland General Assembly had twice rejected bills that included an advisory verdict system like the one employed in Florida.¹¹¹ The court reasoned that by twice

mining the sentence. Some examples of aggravating factors include: "[t]he defendant committed the murder at a time when he was confined in any correctional institution," "[t]he victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct," and "[t]he defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder." *Id.* §§ 413(d)(2), 413(d)(6). Examples of mitigating factors include: "[t]he defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution;" and "[i]t is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society." *Id.* §§ 413(g)(3), 413(g)(7).

104. *Id.* § 413(k) (emphasis added).

105. *Burch*, 358 Md. at 284, 747 A.2d at 1212 (citing *Hirsch v. Md. Dep't of Natural Res.*, 288 Md. 95, 116, 416 A.2d 10, 21 (1980); *Pope v. Sec'y of Pers.*, 46 Md. App. 716, 717, 420 A.2d 1017, 1018 (1980)).

106. *Id.* at 285, 747 A.2d at 1213.

107. Md. R. 4-345(b); *see supra* note 2 (stating what Rule 4-345(b) permits regarding the power of a trial judge to reconsider sentences).

108. *Burch*, 358 Md. at 280, 747 A.2d at 1210.

109. *Id.* at 283, 747 A.2d at 1212. Burch also argued that section 413(k) "only requires the judge to impose a death sentence in accord with the jury verdict and is not a limitation on the judge's power to modify sentences." *Id.*

110. *Id.* at 284, 747 A.2d at 1212; *see also supra* notes 74-89 and accompanying text (explaining the legislative history of the current death penalty laws in Maryland and in other states).

111. *See Burch*, 358 Md. at 290-91, 747 A.2d at 1215-16. Three death penalty laws were introduced in 1977 and 1978: Senate Bill 374 (the one eventually accepted), Senate Bill 106, and Senate Bill 373. *Id.* Senate Bills 106 and 373 employed the advisory jury verdict model similar to Florida's system. *Id.* at 291, 747 A.2d at 1216. Governor Marvin Mandel vetoed Senate Bill 106, and the Senate Judicial Proceedings Committee "reported unfavorably" on Senate Bill 373. *Id.*

rejecting a system that allowed advisory opinions, the legislature demonstrated its faith in jury authority over sentencing.¹¹² The court concluded, therefore, that if the legislature did not want a judge to be able to override the jury's verdict, it would not have wanted that same judge to be able to reconsider the sentence at a later time.¹¹³

Finally, the court considered judicial efficiency concerns and the traditional role of the jury and concluded that the trial judge had no authority to override or reconsider a jury sentence.¹¹⁴

IV. ANALYSIS

In *Burch*, the Court of Appeals confronted the concept of jury override,¹¹⁵ which permits the trial judge to impose a different sentence than the one reached by the jury.¹¹⁶ The *Burch* court rejected this concept and emphasized the legislative intent to vest capital sentencing authority in the jury.¹¹⁷ By rejecting the jury override system, the *Burch* court properly acknowledged the role of the jury as the voice of the community and the special nature of capital punishment. Moreover, the decision in *Burch* recognized that a jury override system

112. *Id.* at 291-92, 747 A.2d at 1216.

113. *Id.* at 292, 747 A.2d at 1216. The court also highlighted cases from New Mexico and Wyoming that also dealt with the jury override issue. *Id.* at 292-95, 747 A.2d at 1216-18. The two states and Maryland have similar death penalty laws and rules of procedure governing review of sentences. *Id.* at 292, 747 A.2d at 1216. Courts in both Wyoming and New Mexico reached similar conclusions about the power of the trial judge in reconsidering sentences. *Id.*, 747 A.2d at 1216-17. The high courts of both states concluded that the appellate courts, not the trial courts, have the power to review death sentences. See *Hopkinson v. State*, 632 P.2d 79, 153 (Wyo. 1981) ("[T]he [trial] judge has no ability to overrule the jury's determination, short of finding, as a matter of law, the evidence insufficient to support the jury's conclusion."); *State v. Guzman*, 676 P.2d 1321, 1328 (N.M. 1984) ("In a jury proceeding, the jury determines whether to impose the death penalty; the trial judge must abide by this determination. . . . The trial judge, therefore, correctly ruled that it had no authority to modify the death sentence in a jury proceeding."); see also *Burch*, 358 Md. at 294-95, 747 A.2d at 1217-18 (discussing and quoting the holdings of these cases).

114. *Burch*, 358 Md. at 290, 747 A.2d at 1215-16 (quoting Memorandum from Thomas J. Peddicord, Jr., *supra* note 23, at 37); see also *infra* notes 150-158 and accompanying text (describing the economic and judicial costs of the jury override system).

115. In the jury override system, the jury's sentencing decision acts as an advisory verdict. See Russell, *supra* note 39, at 10. The override statutes permit the judge to either accept or override the jury's verdict. *Id.* Four states—Alabama, Delaware, Florida, and Indiana—adopted the jury override system. *Id.* Of the four states, Florida was the first state to implement the system, and the Supreme Court upheld its constitutionality in *Proffitt v. Florida*, 428 U.S. 242, 248-53 (1976). The *Proffitt* Court explained that jury sentencing is not a constitutional requirement and, in fact, suggested that judicial power of sentencing should lead to greater consistency in the imposition of capital punishment at the trial level because of the trial judge's greater experience in sentencing. *Id.* at 252.

116. *Burch*, 358 Md. at 289-92, 747 A.2d at 1215-16.

117. *Id.* at 291-92, 747 A.2d at 1216.

is contrary to the traditional role of the jury in capital cases, to the theory behind the death penalty itself, and to specific constitutional provisions. In practice, the jury override system is judicially inefficient and raises the potential for abuse by elected judges. Thus, the *Burch* decision guards against these problems by following a safe and efficient process in deciding capital sentencing cases.

A. *The Importance of Jury Determination in Capital Cases*

1. *An Historical Perspective.*—The traditional role of the jury as the community voice in the decision of guilt or innocence is especially critical in capital cases.¹¹⁸ Under the common law and throughout the last century, government has mandated death sentences for certain categories of crimes.¹¹⁹ In specific cases, however, jurors would disregard their oaths and refuse to convict a defendant of one of those crimes if they felt that the death penalty was morally unjustified for that defendant.¹²⁰ Thus, jurors played a role as “nullifier of government policy”¹²¹ by refusing to convict certain defendants when they believed that the defendant did not deserve the death penalty.¹²² Jurors’ disagreement with state-determined punishment forced judges and legislators to modify capital punishment statutes to more accurately reflect society’s moral sensibilities.¹²³ An examination of history reveals that juries and the process of jury sentencing “played a critical role in ensuring that capital punishment is imposed in a manner consistent with evolving standards of decency.”¹²⁴ In *Burch*, the Court of Appeals reviewed the history of Maryland’s death penalty sentencing scheme and explained that the Maryland General Assembly had examined several different capital punishment systems, such as the Flor-

118. See Mello & Robson, *supra* note 32, at 51. A death penalty decision requires a connection between the judicial proceeding and community values in order to be morally and constitutionally legitimate. *Spaziano v. Florida*, 468 U.S. 447, 483 (1984) (Stevens, J., dissenting). The Supreme Court has recognized that the Eighth Amendment draws its meaning “from the evolving standards of decency” of society. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Therefore, the jury, as the representative of the community, acts as the constitutionally required link between the penal system and contemporary community values. *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968).

119. *Spaziano*, 468 U.S. at 483-84 (Stevens, J., dissenting). Justice Stevens explained: “Under the common law capital punishment was mandatory for all felonies, and even through the last century it was mandatory for large categories of offenses.” *Id.* at 483.

120. *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976).

121. Higginbotham, *supra* note 93, at 1051.

122. *Spaziano*, 468 U.S. at 484 (Stevens, J., dissenting).

123. See *id.* (explaining that jury reluctance to convict defendants under mandatory sentencing schemes resulted in discretionary jury sentencing in many jurisdictions).

124. *Id.*

ida and Georgia systems.¹²⁵ In 1978, the General Assembly made the deliberate choice to retain the jury as the sentencing body in capital cases and not to allow a trial judge to alter that jury decision.¹²⁶ Thus, the *Burch* court followed the established principle of allowing the jury to have the final decision in capital sentencing.

2. *The Theory of Punishment in Death Penalty Cases.*—The underlying policies of capital punishment support the idea that the jury is the body best suited to decide in which cases the death penalty is an appropriate punishment. Four widely accepted reasons exist for the imposition of state-sanctioned punishment: rehabilitation of the offender, incapacitation of the offender, deterrence of potential offenders, and retribution, or the community's desire for revenge.¹²⁷ The first of these reasons is obviously not the justification for the death penalty because death cannot possibly accomplish the goal of rehabilitation.¹²⁸ The second justification—incapacitation—may be accomplished through less extreme means such as a life sentence without the possibility of parole.¹²⁹ The death penalty may serve the social purpose of deterrence, but statistical attempts to measure the deterrent effect of capital punishment have been inconclusive.¹³⁰ Because people kill for different reasons (for example, some kill in the heat of passion, while others kill for money), the intended deterrent effect of the death penalty will not reach everyone who kills.¹³¹ The Supreme Court has articulated that the legislatures, not the courts, are the proper bodies to determine the deterrent value of capital punishment.¹³²

125. See *Burch*, 358 Md. at 289-92, 747 A.2d at 1215-16 (describing the various capital punishment systems proposed in the 1977 and 1978 sessions).

126. *Id.* at 289, 747 A.2d at 1215.

127. See *Spaziano*, 468 U.S. at 477-78 (Stevens, J., dissenting) (listing these justifications for punishment and explaining that in order to determine whether punishment is cruel and unusual, one must first identify the reasons for imposing the punishment).

128. *Id.* at 478.

129. *Id.*

130. See *Gregg v. Georgia*, 428 U.S. 153, 183-86 (1976). In announcing the judgment of the Court, Justice Stewart noted that "[a]fter all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this deterrent effect may be." *Id.* at 185 (quoting C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 25-26 (1974)).

131. See *id.* at 185-86. Mandatory capital punishment may have a deterrent effect on people who kill for money, but the Court has invalidated mandatory capital punishment sentencing schemes. See *Spaziano*, 468 U.S. at 480 (Stevens, J., dissenting). Therefore, capital punishment cannot rest entirely upon deterrent considerations. *Id.*

132. *Gregg*, 428 U.S. at 186 (citing *Furman v. Georgia*, 408 U.S. 238, 403-05 (1972) (Burger, C.J., dissenting)).

Retribution stands out as the most likely explanation for the death penalty; "capital punishment is an expression of society's moral outrage at particularly offensive conduct."¹³³ The decision to impose capital punishment rests upon "an assessment of . . . the 'moral guilt' [an ethical judgment] of the defendant."¹³⁴ Because capital punishment is a vehicle for the community to express outrage, a jury should be the body entrusted with the task of deciding whether or not to impose it.¹³⁵ A jury is composed of a cross section of the community and therefore is in the best position to judge the offender on the scale of community outrage.¹³⁶ While the Court has developed procedural safeguards for defendants, sentencing is not an algebraic equation;¹³⁷ the sentencer must resolve both pure and special questions of fact.¹³⁸ In resolving these special questions of fact, a jury uses its moral, fac-

133. *Id.* at 183. Justice Stewart added: "[t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law." *Id.* (quoting *Furman*, 408 U.S. at 308 (Stewart, J., concurring)).

134. *Spaziano*, 468 U.S. at 481 (Stevens, J., dissenting) (quoting *Enmund v. Florida*, 458 U.S. 782, 800-01 (1982)).

135. See Mello & Robson, *supra* note 32, at 49-50.

136. *Id.*; see also Mello, *supra* note 76, at 931 ("Because the death penalty is society's expression of outrage, juries rather than judges are more likely to rank reliably the offender and his or her offense on the yardstick of community anger."). But cf. Comment, *Is the Power to Be Lenient Also the Power to Discriminate? An Analysis of Justice Blackmun's Evolving Perspective on Jury Discretion in Capital Sentencing*, 5 TEMPLE POL. & CIV. RTS. L. REV. 75, 76 (1995) ("[W]hat makes the American jury so valuable, the gathering of twelve ordinary people, is also what makes it so dangerous."). Supporters of the jury override system believe that it will lead to greater consistency in sentencing because the trial judge has more knowledge and experience with which to consider the facts of the case before him. *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) ("[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury . . ."); *Schiro v. State*, 451 N.E.2d 1047, 1058 (Ind. 1983) ("Rather, the trial court, with more experience in the criminal system, has better knowledge with which to compare the facts of this case with that of other criminal activity.").

Other supporters of the jury override system claim that the judge will ensure that the death penalty is not imposed in a "wanton or freakish manner" because of jury prejudice. *Ex parte Hays*, 518 So. 2d 768, 776 (Ala. 1986). Because jurors who have never decided a capital case may be shocked by the severity of the crime they are considering, judges may be better able to balance the facts of the case because of their experience in the criminal system. See *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973). "Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience." *Id.*

137. See Note, *The Death Penalty Cases: Shaping Substantive Criminal Law*, 58 IND. L.J. 187, 208 (1982) [hereinafter *The Death Penalty Cases*] (explaining the importance of jury input in sentencing decisions because the question of whether someone lives or dies involves moral and legal judgments, not simply mathematics).

138. *Id.* Examples of the special questions of fact that the jury must resolve include weighing the aggravating factors against the mitigating factors and determining whether the defendant constitutes a continuing threat to society. *Id.*

tual, and legal judgments, and brings in the values of the community to reach a sentencing decision.¹³⁹ The jury therefore performs the constitutionally mandated function of serving as the link between contemporary community values and the penal system.¹⁴⁰ The *Burch* decision thus affirms the strength of this link and ensures that judges have no authority to interfere with a power that has been entrusted to a jury.

3. *Constitutional Concerns.*—Although a majority of the Supreme Court upheld the jury override system as constitutional,¹⁴¹ judges on state courts and legal commentators continue to argue that the system violates the Fifth Amendment to the Constitution.¹⁴² The Double Jeopardy Clause of the Fifth Amendment provides that once a jury finds a criminal defendant not guilty of a crime, the issue of that defendant's guilt or innocence is beyond the power of the judge to override.¹⁴³ The changes in states' capital punishment statutes caused a substantive change in the elements of the degrees of homicide.¹⁴⁴ In

139. *Id.* In contrast to the jury's duty, a judge's duty does not reflect the community's sentiment; instead, the judge's role is to apply the law impartially. Mello & Robson, *supra* note 32, at 49. Because the death penalty involves a determination combining both community sentiment and law, judges should not make sentencing decisions "unless or until we are willing to evaluate prospective judges as to their propensity to embody communal consciousness." *Id.* at 47.

140. See Mello & Robson, *supra* note 32, at 52 ("The central function of the jury as a bulwark between an individual and the government is especially vital when the individual's life is at stake."); see also *Harris v. Alabama*, 513 U.S. 504, 517 (1995) (Stevens, J., dissenting). Justice Stevens wrote: "It may well be argued that . . . the jury may be regarded as a microcosm of the community, who will reflect the changing attitudes of society as a whole to the infliction of capital punishment, and that there could therefore be no more appropriate body to decide whether [to impose the death penalty] . . ." *Harris*, 513 U.S. at 517 (Stevens, J., dissenting) (quoting ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, Report 200 (1953)).

141. *Proffitt*, 428 U.S. at 248-52.

142. See, e.g., *Schiro v. State*, 451 N.E.2d 1047, 1064-65 (Ind. 1983) (DeBruler, J., concurring and dissenting) (arguing that a jury recommendation against the death penalty should be treated as a verdict of not guilty on the issue of punishment and that the jury override system violates the Double Jeopardy Clause); *The Death Penalty Cases*, *supra* note 137, at 189-90 (arguing that the sentencing phase of a capital trial is like a trial to determine whether the defendant is guilty of capital murder and that procedural due process guarantees require a jury to make such determinations).

143. U.S. CONST. amend. V. No state statute or act of Congress can change this. Only a constitutional amendment could do so. See *Schiro*, 451 N.E.2d at 1064 (DeBruler, J., dissenting). The underlying basis of the Double Jeopardy Clause is that the State should not be permitted to make repeated attempts to convict an individual for an offense after a jury's acquittal. *Green v. United States*, 355 U.S. 184, 187-88 (1957). Such repeated attempts by the State would subject the individual to "embarrassment, expense and ordeal and [would compel] him to live in a continuing state of anxiety and insecurity, as well as [enhance] the possibility that even though innocent, he may be found guilty." *Id.*

144. See *The Death Penalty Cases*, *supra* note 137, at 190.

the bifurcated and trifurcated death penalty statutes, the sentencing phase of a capital trial became a second trial to determine whether a defendant, who had already been convicted of murder, was also guilty of capital murder.¹⁴⁵ The aggravating circumstances and other factors that the sentencer must weigh are factual elements of the additional crime of capital murder.¹⁴⁶ Therefore, because the sentencer is deciding additional factual elements, a jury should make these findings.¹⁴⁷ Consequently, a jury recommendation against the death penalty should be treated as an acquittal of capital murder,¹⁴⁸ which the Double Jeopardy Clause prevents the trial judge from altering.¹⁴⁹ By failing to endorse the jury override system in Maryland, the Court of Appeals in *Burch* has helped to establish a sentencing scheme that is consistent with these constitutional concerns. This decision thus ensures that a criminal defendant's right against double jeopardy will not be violated during the sentencing phase of capital cases.

B. *Practical Application of the Jury Override System*

1. *The Economic and Judicial Costs of the Jury Override.*—States created the jury override to check juries' wanton or freakish application of the death penalty, but judges often use it as a tool to increase the jury's recommendation of life to a sentence of death and, in doing so, increase the judicial and economic costs of capital cases.¹⁵⁰ For example, as of 1984, Florida courts had sentenced 347 persons to death.¹⁵¹ In 85 of those cases, the trial judge overrode the jury's advisory life sentence.¹⁵² The Florida Supreme Court reviewed 61 of those 85, but it affirmed only 19.¹⁵³ A federal court later reversed 7 of the 19

145. *Id.*

146. *Id.*

147. *See Schiro*, 451 N.E.2d at 1066 (DeBruler, J., dissenting) ("The substance beneath [a recommendation of death] is a factual adjudication and moral judgment of the jury, not a court master, not a court commissioner, but a jury of twelve . . ."); *The Death Penalty Cases*, *supra* note 137, at 190 (arguing that the Constitution and due process guarantees mandate that the jury make such findings).

148. *Schiro*, 451 N.E. 2d at 1065 (DeBruler, J., dissenting).

149. *See id.* at 1064-65 ("[T]he sentencing judge in making a final determination of the sentence can have no power to override it and impose death.").

150. *See Mello & Robson*, *supra* note 32, at 52-55.

151. *Id.* at 53. Florida's system provides a good example for examination because it was the first state to implement the jury override system, and, of the four states, it has used the override system most frequently. *See id.* at 32-34.

152. *Id.* at 53.

153. *Id.*

cases.¹⁵⁴ Thus, out of the original 85 override cases, the appellate system affirmed only 12 cases or roughly 20%.¹⁵⁵

In another example, in the years between 1986 and 1991, the Florida Supreme Court reversed overrides in more than 93% of the relevant cases.¹⁵⁶ Some commentators estimate that a repeal of the override power would reduce the Florida Supreme Court's caseload by 25%.¹⁵⁷ As the Court of Appeals of Maryland recognized in *Burch*, the jury override system involves a judge duplicating the jury's effort,¹⁵⁸ with appellate courts thereafter consistently rejecting the judge's conclusion and affirming the jury's sentence.

2. *The Potential for Abuse by Elected Judges.*—The jury override system also creates a mechanism by which political motivations, judicial biases, and public sentiment may enter into the realm of capital sentencing—a result that is contrary to the tenets of the American legal system.¹⁵⁹ In most states that impose capital punishment, judges are subject to election or retention.¹⁶⁰ The political election process sometimes compels a judge to choose between that of which she thinks society will approve and that which the law requires.¹⁶¹ In this

154. *Id.*

155. *Id.*

156. See Mello, *supra* note 76, at 937-38; *id.* at 938 (concluding that a reversal rate of over eighty percent is a strong indicator that trial judges should listen to juries because "a jury's verdict for life means life, save in the rarest of cases").

157. See Mello & Robson, *supra* note 32, at 54. The jury override system not only sacrifices judicial efficiency, but it also increases the overall cost of the judicial system. See *id.* at 54-55. Commentators estimated the economic cost of the jury override system in Florida to be approximately \$8.7 million per year. *Id.* at 55. That number was derived by multiplying the average cost of an appeal to the Florida Supreme Court (\$100,000) by the number of override cases in 1984 (87 cases). *Id.* Because the appellate courts reversed eighty percent of the override cases, the money spent on the appeal is "wasted," and the state must then pay for the appellant's life in prison in addition to the money spent on the appeal process. *Id.*

158. *Burch*, 358 Md. at 290, 747 A.2d at 1215 (quoting Memorandum from Thomas J. Peddicord, Jr., *supra* note 23, at 37).

159. See Erlich, *supra* note 29, at 1440-46 (arguing that political election of judges allows these elements to creep into death penalty sentencing decisions).

160. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 776 (1995). Thirty-eight states—Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming—currently have capital punishment statutes. *Id.* at 779 n.88. All of these states, with the exception of Connecticut, Delaware, New Hampshire, New Jersey, South Carolina, and Virginia, use elections at some point in judicial selection or retention. *Id.* at 779 n.89.

161. *Jacobs v. State*, 361 So. 2d 640, 650-51 (Ala. 1978) (Jones, J., dissenting).

way, elections threaten the independence of the judiciary and a capital defendant's constitutional rights because judges may succumb to political pressure and deprive a defendant of his due process rights.¹⁶²

Political pressure is even more apparent when judges preside over highly publicized cases.¹⁶³ The jury override system provides judges with a mechanism by which to escape political attacks from opponents and the media alleging, for example, that the judge is soft on the death penalty.¹⁶⁴ Bryan Stevenson, head of the Equal Justice Initiative in Alabama, conducted a multiple regression analysis on Alabama overrides and concluded that "there is a statistically significant correlation between judicial override and election years in most of the counties where these overrides [took] place."¹⁶⁵ After taking into account the necessary factors for analysis, Stevenson found that something other than legal doctrine had affected Alabama judges' use of the jury override.¹⁶⁶ The death penalty has become such a prominent campaign issue that judges will likely suffer political consequences for failing to override popular jury verdicts—especially in highly publicized cases that might eventually become election issues.¹⁶⁷

162. See Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 Wis. L. Rev. 1017, 1019-20. "When a judge plays both a partisan and a judicial role, her tenure may depend on the outcome of a case. Significantly, the United States Supreme Court has already recognized a due process violation under similar circumstances" *Id.* at 1020.

163. See Bright & Keenan, *supra* note 160, at 765. Toughness on crime has emerged as the dominant political issue. *Id.* at 770-71. The death penalty has become the vehicle by which politicians demonstrate how tough they are on crime. *Id.* at 770. Given these political pressures, judges are more likely than jurors to impose the death penalty, and in states that have a jury override system, judges override jury-imposed life sentences far more often than they override jury-imposed death sentences. *Id.* at 766.

164. See Erlich, *supra* note 29, at 1441.

165. Burnside, *supra* note 162, at 1039 (internal quotation marks omitted) (quoting Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 256 (1994), quoting in turn Bryan Stevenson). The study asked: "If one looks at the entire period covered by the Alabama override statute, could the existing pattern reasonably have occurred by chance?" *Id.* at 1040. A measurement of statistical significance is used to determine whether chance caused the difference. *Id.* Once the threshold for statistical significance has been crossed, some factor besides chance caused the difference; in the case of jury override and election, the other factor is unconstitutional, arbitrary capital sentencing. *Id.* at 1041.

166. *Id.* The other factor considered in the analysis was the impact of the 1986 California Supreme Court election, which resulted in the removal of the chief justice because of her refusal to impose the death penalty in certain cases. *Id.* After her removal from the bench, judges became even more concerned about the impact of death penalty decisions on their prospects for reelection. See *id.* Stevenson therefore split the data into subsets divided by the 1986 election and found the results to be statistically significant. See *id.*

167. See Bright & Keenan, *supra* note 160, at 785 ("Not only the judge, but her political supporters as well, may suffer the consequences of an unpopular ruling in a capital case.").

Thus, a judge seeking reelection holds a *personal interest* in the outcome of a capital punishment case and can deprive a defendant of constitutional rights because her tenure may depend on the public's response to her decision in the case.¹⁶⁸ Indeed, the Supreme Court in *Tumey v. Ohio*¹⁶⁹ held that a judge's "direct, personal, substantial, pecuniary interest"¹⁷⁰ in the outcome of a criminal case violates the criminal defendant's due process rights.¹⁷¹ In the case of elected judges, "[a] judicial position is a career for most, which effectively ends if not reelected."¹⁷² Because reelection concerns present a challenge to a judge's career interests and jury override statutes allow judges to impose the death penalty in politically charged situations, jury override statutes violate due process as described in *Tumey*.¹⁷³ Judicial elections in states with jury override statutes threaten the independent decisionmaking of a judge and erode a capital defendant's due process rights.

V. CONCLUSION

Burch v. State presented the Court of Appeals of Maryland with the option of including some sort of jury override in its death penalty scheme, but the court correctly rejected this proposal. The legislature in Maryland, as well as in a great majority of other states, used history and policy considerations in designating the jury as the ultimate sentencing authority. The jury override system that exists in some states is contrary to the traditional role of the jury in Maryland and, in practice, is judicially inefficient and contrary to many policy goals. The jury maintains the critical link between the community and the penal system, and the nature of the death penalty requires this link to en-

168. Burnside, *supra* note 162, at 1020.

169. 273 U.S. 510 (1927).

170. *Id.* at 523.

171. *Id.* at 535. Two separate tests for violation of due process arose from *Tumey*. Burnside, *supra* note 162, at 1045. The first test is whether the judge has a "'direct, personal, substantial, pecuniary interest'" in the outcome of the litigation. *Id.* (quoting *Tumey*, 273 U.S. at 523). If so, due process is violated. *Id.* The second test for determining whether there is a due process violation is "if there is 'a possible temptation . . . not to hold the balance nice, clear and true between the State and the accused.'" *Id.* (quoting *Tumey*, 273 U.S. at 532). For the second test, one looks to see whether a judge is faced with "circumstances that present some actual incentive to find one way or the other or a real possibility of bias." *Id.* at 1046 (quoting *DelVecchio v. Illinois Dep't of Corrections*, 31 F.3d 1363, 1372 (7th Cir. 1994)). If these circumstances cause a judge "to forget the burden of proof required to convict the defendant," then the judge violates the defendant's due process rights. *Tumey*, 273 U.S. at 532.

172. Burnside, *supra* note 162, at 1046.

173. *Id.* at 1047.

sure that the application of the death penalty is consistent with current community values.

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